divorce and alimony on the ground of desertion. The husband pleaded the Indiana divorce as a bar. The Common Pleas court decreed *divorce and alimony*. The District Court refused to try the question of alimony *de novo*. The statute provides for such trial. For this refusal the Supreme Court reversed the District Court, holding that "the wife's domicile remained unaffected by the husband's desertion." And that "the Indiana divorce was no defence," because Ohio was the domicile, the place of the *delictum*, and divorce was obtained on false grounds.

In truth, the decision should be placed on the ground that the *ex parte* divorce was a fraud upon the rights of the wife, and not recognisable in Ohio, and upon this ground will find precedent in *Shannon* v. *Shannon*, 4 Allen 134; *Hoffman* v. *Hoffman*, 46 N. Y. 30; *Prosser* v. *Warner*, 47 Vt. 667; *Smith* v. *Smith*, 13 Gray 209; *Leith* v. *Leith*, 39 N. H. 20; *Kerr* v. *Kerr*, 41 N. Y. 272; and in the learned article of Judge REDFIELD, in 3 Am. Law Reg. (N. S.) 193. It is not authority for the doctrine that alimony is grantable after a divorce *à vinculo*. The point decided was, that the District Court erred in not trying the question of alimony *de novo*, as provided by the statute.

The case of *Crane* v. *Meginnis* is not authority for *Cox* v. *Cox*, because the Maryland court was governed by an express statute enacted in 1777, and incorporated in Rev. Stat., art. 51, § 17, and by the prior decisions that the Maryland courts had inherent original jurisdiction. Nor is the case of *Shotwell* v. *Shotwell* authority, because that was overruled in *Lawson* v. *Shotwell*, 29 Miss. 630; followed in *Bankston* v. *Bankston*, 27 Miss. 629.

This case of *Cox* v. *Cox*, is not sustained by the statute. The statute provides for three kinds of alimony, *pendente lite* in § 5701, separate maintenance in § 5702, and permanent upon the granting of a divorce *à vinculo* in sects. 5699, 5700. Sect. 5702 provides for a separate maintenance and not for alimony after a divorce, because (1), the statute speaks of the petition as the wife's petition against her husband: (2) in such cases the statute provides for the husband to file a cross petition for divorce; and (3) the statute, in sect. 5703 provides that in such cases the judgment shall (*a*) provide for the children; (*b*) give the wife a separate maintenance, (*c*) restore to her her property; and (*d*) grant her the rights and powers of a *feme sole*, "free from the control or interference of her husband." In fact, this statute is based upon and taken from the old doctrine of divorce *a mensa et thoro*, and can only be understood with reference to that doctrine. The principal case being founded on *Cox* v. *Cox*, and the foregoing statute—a misconstruction of it—is of no value and indeed worthless as an authority, precedent, or an exposition of juridical reasoning.

JOHN F. KELLY.

Bellaire, Ohio.

Supreme Court of Pennsylvania.

BUSH *v.* BREINIG.

A contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable, and may be avoided by himself, though the intoxication was voluntary, and not procured by the circumvention of the other party.

A. made a bid at a public sale of a piece of real estate, and shortly thereafter

signed a contract, and paid earnest money on account. It was proved, that at the time the contract was signed, he was so intoxicated that he did not know what he was doing. He afterwards brought suit to recover his earnest money. *Held*, that his intoxication made the contract voidable, and that he was entitled to recover.

ERROR to Common Pleas Lehigh county.

Assumpsit by James H. Breinig against William H. Bush.

William H. Bush, the owner of a hotel property in Quakertown, advertised it for public sale. James H. Breinig bought the property at the sale for $13,400, his bid being the highest. Shortly after the time of sale, the agreement of sale was executed, Breinig paying $495 down in cash. Before and during the continuance of the sale, up to the time the agreement was executed, Breinig was drinking excessively, and by reason thereof became intoxicated to such degree that, at the time the agreement was executed, he did not know what he was doing, and was bereft of the use of his reason and understanding. Breinig afterwards brought this action to recover back the $495. The jury rendered a verdict for plaintiff, and judgment being entered thereon, defendant took this writ.

Harry G. Stiles and *John D. Stiles*, for plaintiff in error.

Marcus C. L. Kline, for defendant in error.

TRUNKEY, J.—When the plaintiff's bid was accepted, the bargain was struck, and there was an oral agreement for the sale and purchase of land on the terms stated in the conditions of sale. That agreement was not void, but voidable. Neither party could have compelled specific performance. Either would have a right of action for damages resulting from non-performance by the other; but the vendor could not tender a deed and recover the purchase-money, for that would be enforcing specific performance. He could only recover the actual loss. Upon the signing of the conditions, *prima facie* there was a contract that could be specifically enforced. Money paid on either the oral or written contract could not be recovered unless there was cause for rescission. Here it is conceded that there was an oral contract; but the plaintiff denies that he made a written contract, and paid money and note thereon, because at the time his signatures and money were given, he was incapable of making a contract by reason of drunkenness. If he was without reason and understanding, the payment of the money ought not to be treated as voluntary, nor his signature as creating a new obligation. The conditions of sale may have been read in

his hearing at the auction, and he may have understood them when he bid; but he paid no money until the time of signing the alleged contract, and if he was then bereft of reason, he may avoid the apparent obligation made while in that condition. It is not a question whether what he did was the carrying out of a fair and reasonable oral contract, or whether the property was worth the sum bid; it is a question of his capacity to make a contract at the time he signed the conditions and paid the money. The subject of the contract was not necessary for himself or family. He took nothing into his possession, and therefore had nothing to restore in the act of rescission; and he brought suit so promptly that at the trial the question of delay in rescinding was not raised.

The rule formerly was that intoxication was no excuse, and created no privilege or plea in avoidance of a contract; but it is now settled according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable, and may be avoided by himself, though the intoxication was voluntary, and not procured by the circumvention of the other party: 2 Kent Comm. 451. A drunkard when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract in general; but his contract is voidable only, and not void, and may therefore, be ratified by him when he becomes sober: Benj. Sales, par. 33.

The learned judge of the Common Pleas instructed the jury, that the plaintiff could recover only on the ground that the contract did not bind him, because he was intoxicated to a degree that he did not know what he was doing at the time he affixed his seal and gave the money; that, if he was in such a state of drunkenness as not to know what he was doing, he cannot be compelled to perform the contract; and that if, at the time of signing the contract, he was able to comprehend the nature and effect thereof, the alleged intoxication is no defence. All that accords with principles so well settled as to be found in approved text-books. They apply to a case like this; not where an intoxicated man gave his negotiable paper which had passed to an innocent holder for value, as was the case in *State Bank* v. *McCoy*, 69 Penn St. 204.

In answer to the defendant's first point, the court charged that the drunkenness of the plaintiff, to relieve him from the contract, must have been such that he did not know what he was doing; it

must have been such as to suspend the use of reason and understanding. There is no error in that. True, the word "utterly" is omitted, which is used in the defining of the state of drunkenness in Story, Eq. Jur. par. 231; but the sense is not materially different; and that word is omitted by many in the attempt to define the degree of intoxication, and absence of reason. The point was well answered; its single affirmance might have misled the jury. "Unfair advantage" was not a question submitted.

The fifth assignment is not sustained. Although the question ought not to have been allowed when put, for the reason stated in the objection, very soon there was testimony that the witness was intoxicated at the time referred to in the question. No objection was made to its form, and its admission out of order was harmless.

None of the remaining assignments require special remark. Judgment affirmed.

That a contract entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his reason, is voidable, and not void, and hence is capable of ratification by him, and that the intoxicated party may, for that cause, avoid it, although the intoxication was voluntary and not procured through the circumvention of the other party, may be considered as well settled: *Barrett* v. *Buxton*, 2 Aiken 167; *Matthews* v. *Baxter*, L. R., 8 Exch. 132; *Broadwater* v. *Darne*, 10 Mo. 277; *Eaton* v. *Perry*, 29 Id. 96; *Miller* v. *Finley*, 26 Mich. 254; *Mansfield* v. *Watson*, 2 Iowa 111.

Being voidable only, such a contract cannot be impeached by third persons, so long as the party who was intoxicated acquiesces: *Eaton* v. *Perry*, 29 Mo. 96; although it may be by his legal representatives: *Wigglesworth* v. *Steers*, 1 Hen. & Munf. 70.

A contract voidable by reason of the intoxication of one of the parties, may be rescinded by him within a reasonable time after becoming sufficiently sober to know the character of his contract: *Cummings* v. *Henry*, 10 Ind. 109.

The rule as to what will constitute a ratification is substantially the same as in the case of infancy, that any distinct, unequivocal act, after becoming sufficiently sober to comprehend the nature of the transaction, manifesting an intention to be bound by the contract and inconsistent with its disaffirmance, will amount to a ratification: *Mansfield* v. *Watson*, 2 Iowa 111; *Gore* v. *Gibson*, 13 M. & W. 626.

The rule in equity as to this class of contracts is well stated by Sir WILLIAM GRANT, in *Cooke* v. *Clayworth*, 18 Ves. Jr. 12, as follows: "I think a court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time: *Dunnage* v. *White*, 1 Swanst. 137. I say merely upon that ground; as, if there was, as Lord HARDWICKE expresses it in *Cory* v. *Cory*, 1 Ves. 19, any unfair advantage made of his situation, or, as Sir JOSEPH JEKYLL says, in *Johnson* v. *Medlicott*, 3 P. Wms. 130, note a, any contrivance or management to draw him into drink, he might be a proper object of relief in a court of equity. As to that extreme case of intoxication that deprives a man of his

reason, I apprehend that, even at law, it would invalidate a deed obtained from him while in that condition." See also, 1 Story Eq. Jur., sect. 231, *et seq.*; 2 Kent Com. 452, note; *Mansfield* v. *Watson*, 2 Iowa 115; *Shaw* v. *Thackray*, 1 Sm. & G. 540. Though the general doctrine of *Cooke* v. *Clayworth* seems to be well settled, especially in its application to a degree of intoxication less than excessive, there seems to be some difference of opinion as to the true interpretation of the case, as to whether a court of equity will assist a person to get rid of an agreement or deed merely upon the ground of his excessive intoxication, where there has been no unfair advantage taken of his condition, nor any contrivance or management to draw him into drink. All of the authorities now agree that equity will relieve if any unfair advantage has been taken of him, etc. The following authorities seem to favor the position that equity will not relieve merely upon the ground of intoxication (no distinction being made as to the degree thereof), in the absence of fraud, unfair advantage, etc., but will leave the party to his remedy at law: *Campbell* v. *Ketcham*, 1 Bibb 406; *White* v. *Cox*, 3 Hayw. 82; *Rutherford* v. *Ruff*, 4 Dessaus. 350: *Jones* v. *Perkins*, 5 B. Mon. 225; *Johnson* v. *Medlicott*, 3 P. Wms. 130, note *a*; *Shaw* v. *Thackray*, 1 Sm. & G. 540; *Pittenger* v. *Pittenger*, 3 N. J. Eq. 161; *Hutchinson* v. *Tindall*, 3 Id. 360; *Crane* v. *Conklin*, 1 Id. 346; 2 Kent Com. (12th ed.) 452, note *c*; 1 Pars. Cont. (6th ed.) 384, note *d*.

The following authorities, on the other hand, favor the proposition that, where the drunkenness is so excessive as to deprive a man of his reason, equity will relieve: *Mansfield* v. *Watson*, 2 Iowa 115; *Taylor* v. *Patrick*, 1 Bibb 168; *Wigglesworth* v. *Steers*, 1 Hen. & Munf. 70; *Birdsong* v. *Birdsong*, 2 Head. 289; *Belcher* v. *Belcher*, 10 Yerg. 121; *French* v. *French*, 8 Ohio 214. See also the editor's note at the end of *Cooke* v. *Clayworth*, 18 Ves. Jr. (Sumner's ed.) 18; 1 Story's Eq. Jur., sects. 231, 233, and note; Metc. on Cont. 82; *Barrett* v. *Buxton*, 2 Aik. 167; *Gore* v. *Gibson*, 13 M. & W. 623.

Perhaps the most of the authorities on this point may be reconciled on the ground that dealing with a person in a state of excessive intoxication is *prima facie* fraudulent. See *Jones* v. *Perkins*, 6 B. Mon. 225, citing 1 Story's Eq. Jur., sects. 233, 234.

As to the decision in the principal case, there can be no question as to its correctness. The only wonder is that the correctness of the judgment of the Court of Common Pleas should have been questioned.

M. D. EWELL.

Chicago.

Supreme Court of Ohio.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY *v.* SPANGLER.

The liability of railroad companies for injuries caused to their servants by the carelessness of other employees, who are placed in authority and control over them, is founded upon consideration of public policy, and it is not competent for a railroad company to stipulate with its employees at the time, and as part of their contract of employment, that such liability shall not attach to it.

ERROR to District Court, Lucas county.

Spangler, the defendant in error, was a brakeman on a freight